No. 20480

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN N. NEWLAND, Trustee in Bankruptcy for HUGHES HOMES, INC., a Montana Corporation, and HUGHEST HOMES ACCEP-TANCE CORPORATION, an Idaho corporation

Appellant,

VS.

WINCEL T. EDGAR and HELEN E. EDGAR, husband and wife,

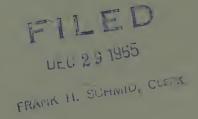
Appellees.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho,

Northern Division

STEPHEN BISTLINE
Actorney for Appellees
101 N. First Avenue
Sandpoint, Idaho





TEXTS AND STATUTES

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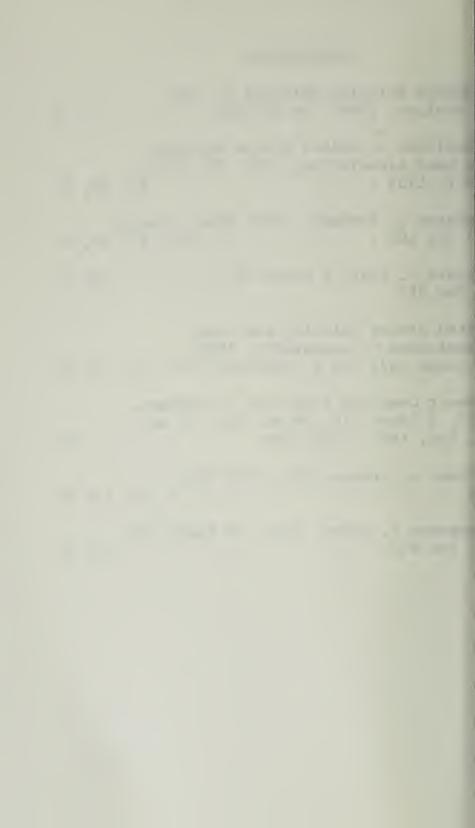
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IN THE UNITED STATES COURT OF APPEALS FOR THE NINIH CIRCUIT

HN N. NEWLAND, Trustee in Bankruptcy r HUGHES HOMES, INC., a Montana rporation and HUGHES HOMES ACCEPTANCE RPORATION, an Idaho Corporation,

Appellant,

VS .

NCEL T. EDGAR and HELEN E. EDGAR, sband and wife,

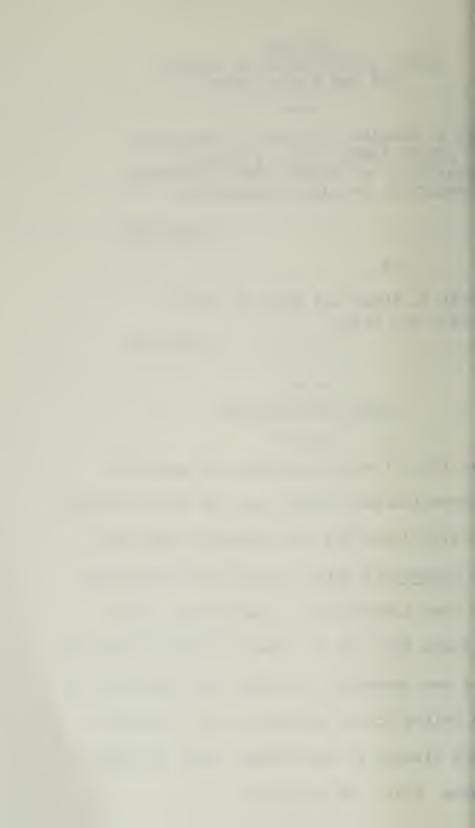
Appellees,

BRIEF FOR APPELLEE

In this diversity action, the appellant rporations have urged that the United States strict Judge did not correctly apply the Lanzarotti rule, United States Building d Loan Association v. Lanzarotti, 1929,

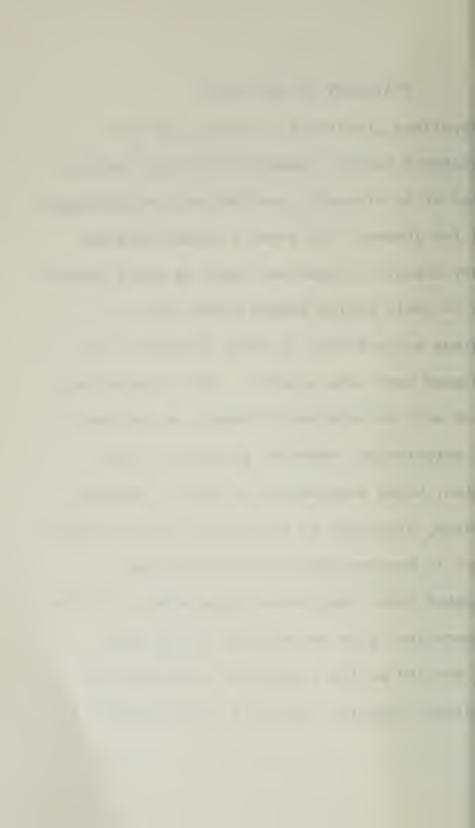
Idaho 287, 274 P. 630-632, which Lanzarotti le was thoroughly analyzed and discussed by United States Circuit Court of Appeals, anth Circuit in the Whitman case, Whitman v.

eene, 1961, 289 P.2d 566.



STATEMENT OF THE FACTS

ppellees, residents of Idaho, and the tgagors herein, brought action for cancellon of an allegedly usurious note and mortgage, for judgment for penalty under the Idaho ry statute. Appellees named as party defendto their action Hughes Homes, Inc., a tana corporation, to which the note and tgage were made payable. This corporation, ch will be referred to herein as the Montcorporation, appeared generally in the ion, being represented by John N. Newland, stee, appointed by the United States District rt in Montana bankruptcy proceedings. ughes Homes Acceptance Corporation, an Idaho poration, also represented by the same Newland as its Trustee in bankruptcy prodings, appeared generally in the action,

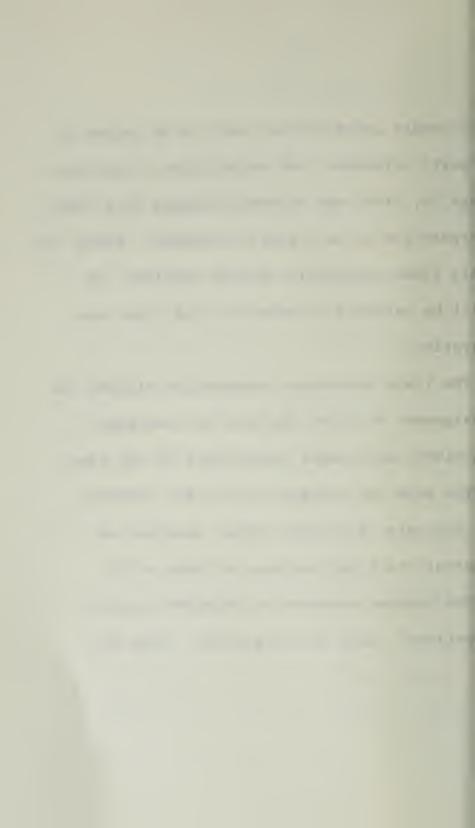


party defendant. By stipulation, Transcript age 26, Order was entered bringing this Idaho orporation in as a party defendant. Being the aly Idaho corporation herein involved, it all be referred to herein as the Idaho corporation.

The Idaho acceptance corporation alleged the signment to it of the note and mortgage wolved, and sought foreclosure of the same.

The note and mortgage called for interest the rate of 10% per annum, usurious as ainst the legal maximum in Idaho of 8%.

The Montana corporation defended: against opellees' claim on two grounds: that the



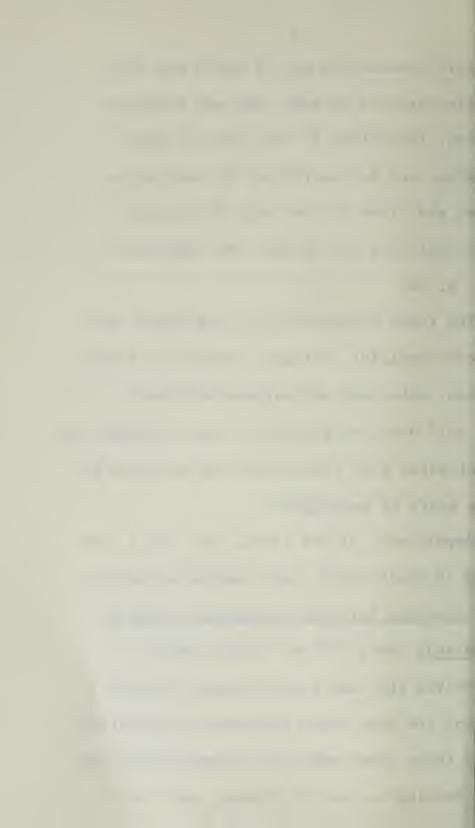
tire transaction out of which the oblition secured by said note and mortgage ose, took place in the state of Washgton, and is controlled by Washington w, and; that in fact only 8% interest s collected and charged the appellees.

p. 30.

The Idaho corporation, in its Answer and coss-complaint, alleged: that all of the tes, debts and obligations evidenced said note and secured by said mortgage were ntracted for, consummated and executed in e state of Washington.

Appellants, at the trial, Rep. Tr. p. 20, and in their brief, have invited attention Anaconda Building Materials v. John N. Ewland, 1964, 336 Fed 2d 625, which avolved the same parent Montana corporation, the same Idaho acceptance corporation, and three other subsidiary corporations, one

Washington, one of Wyoming, and one of

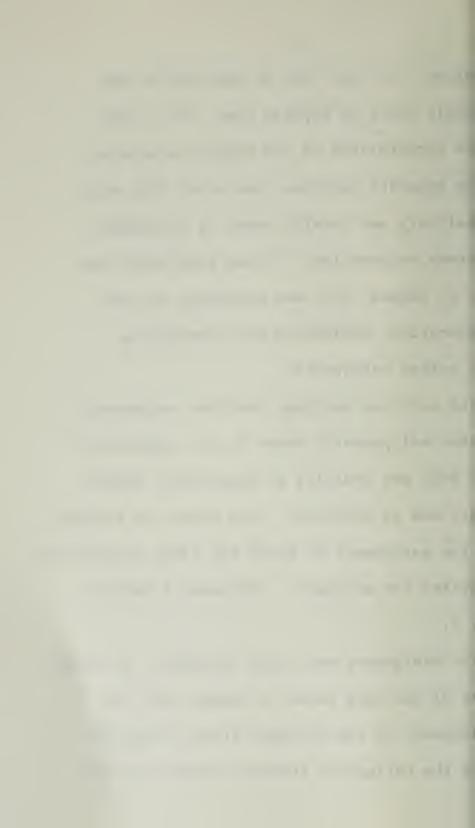


ntana. In that case it was held by the rcuit Court of Appeals that all of the ve corporations of the Hughes enterprise re separate entities, and noted that each bsidiary was totally owned by the parent ntana corporation. It was also noted that . C. Hughes, Jr., was president of each rporation, dominating and mismanaging e entire enterprise The note and mortgage involved encumbered aho real property owned by the appellees, d both are exhibits to appellants pleadgs, and in evidence. Also placed in evidence the assignment by which the Idaho corporation

The assignment was never recorded. No assignnt of the note seems to appear, but the
signment of the mortgage states "together
th the obligation thereby secured and the

quired the mortgage. Defendant's Exhibit

. 3.



omissory Note evidencing the same,"

d, it was stipulated formally that

e note was assigned to the Idaho

rporation on October 10, 1960, also

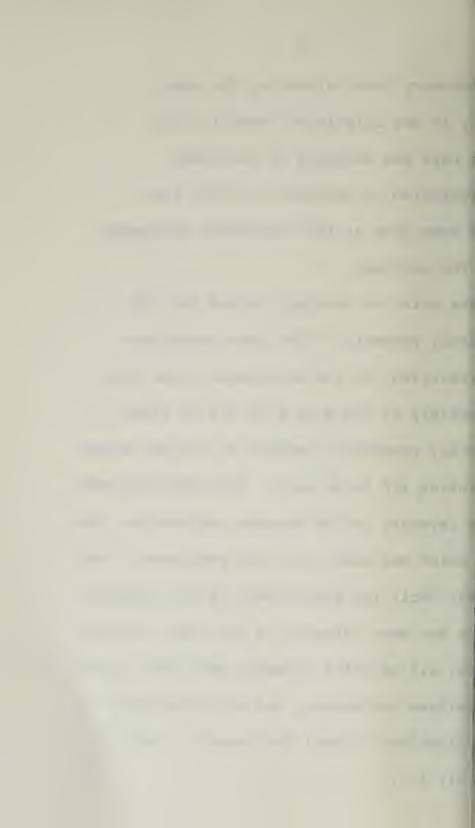
e same date as the unrecorded assignment

the mortgage.

The note and mortgage called for 120

nthly payments. The Idaho acceptance rporation, by the assignment, came into nership of the same with 119 of these nthly payments, computed at 10% per annum terest, yet to be made. The appellees made o payments to the Montana corporation, one which was made after the assignment, and, en, until the appointment of Mr. Newland, de ten more payments to the Idaho corporaon, all of which payments were sent by the pellees to Montana, and were then sent on Blackfoot (Idaho) for deposit. Rep. Tr.

21, 1. 7.



The note was made payable at Butte, ntana, and on a ten-year basis of 120 nthly payments, to retire \$5,445.30, gether with the stated interest of 10%, quired payments of \$71.37 per month. y bank amortization schedule will confirm at \$71.37 per month is required to retire ,400.00 in ten years at ten per cent. It was formally stipulated to by the rporations that as payments were received, o monthly receipt was sent to the plaintiffs ppellees) showing the application of payments ceived to principal and interest." And, at e trial Mr. Edgar, appellee, testified that ere was never a time after he and Mrs. Edgar gan making payments that they were given any vice from either corporation as to what rate terest was being computed at, or but what ey would be making the 120 payments required them. Rep. tr. p. 8, lines 8-21.

77 --- 170 million

It was formally stipulated to that the ntana corporation's agent for this transtion here involved was also a realtor censed to do business in both Idaho and shington, with a residence and only office Newport, Washington. And also formally ipulated that the appellees were Idaho sidents, and the nearest city to their sidence was the town of Newport, Washington. It was testified to by Mr. Edgar, without ntradiction, that the "dealing" primarily ok place at appellee's home in Idaho, and e signing of the papers was in Newport, and at Mr. Jones, the notary to the mortgage, d no part in the transaction other than to t as notary. Rep. tr. p. 7, 1. 19-25;

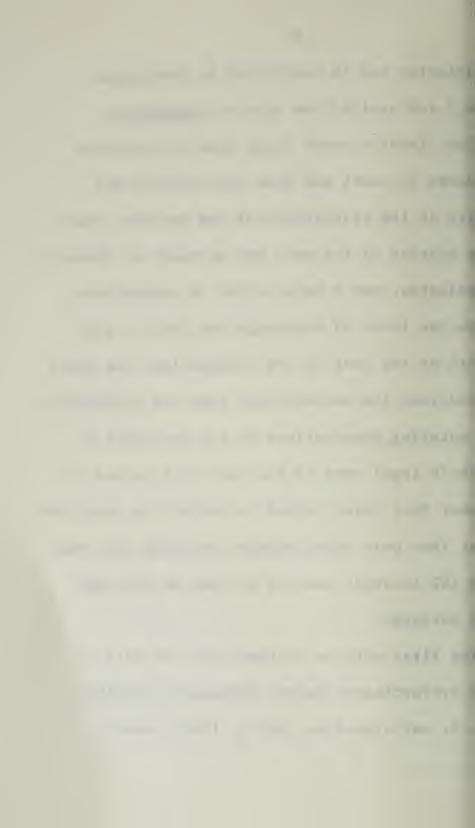
The U.S. District Judge found <u>against</u> the intention of appellants that "the entire ansaction took place in the state of

18, 1. 4-7



shington and is controlled by Washington w," and applied the rule of Lanzarotti. The district court found from the evidence duced in court and from the evidence set orth in the stipulation of the parties, that e signing of the note and mortgage at Newport, shington, was a mere matter of convenience. On the issue of knowledge and lack of good ith on the part of the corporations the court ted that the corporations took the precaution entering computations on its own books at aho's legal rate of 8%, but for a period of most four years failed to advise the appellees at they were being charged anything less than le 10% interest exacted of them on the note d mortgage.

The first written contract for the sale of the prefabricated house, Defendant's Exhibit. 4, was signed on July 6, 1960, some 12



ys before the appellees signed the note and ortgage.

During this 12 day period of time, the contract, fendants' Exhibit No. 4, calling for 120 monly payments of \$68.01 which is just under 9%
r annum, ripened into the note and mortgage
lling for the payments of \$71.37, at 10%
r annum. (\$5400.00 at 8½% on ten years requires
yments of \$66.96; \$5400.00 at 9% on ten years
quires payment of \$68.41)

The contract, Defendants' Exhibit No. 4, is a printed form of the Montana corporation.

e note and mortgage are also on its printed rms, the mortgage specifically providing:

"This mortgage is executed with the mutual understanding that the pre-fabricated house or building purchased from Hughes Homes, Inc., under the contracted dated July 6, 1960, shall be erected * * * *."

Defendants' Exhibit No. 2



The U. S. District Judge in applying the w to the facts of the case, stated that the st recent case involving the <u>Lanzarotti</u> rule me from the Ninth Circuit Court of Appeals, itman v. Greene, 1961, 289 Fed 2d 566, and e gist of the appeal is appellants conntion that the Lanzarotti rule was incorctly applied, and that the District Judge's ndings are improper and unsubstantiated.

In the Whitman case, the Circuit Court conuded by stating, as applied to that case:

The <u>Lanzarotti</u> rule was spelled out in the inion, quoting directly from <u>United States</u>

[&]quot;Under these circumstances we feel that the Lanzarotti rule must be read to apply to those cases involving the doing of business within the state of Idaho, and a purpose to evade the usury laws of that state. In the case at bar the lender did not seek out the borrower in the state of Idaho, nor sit in wait for him in that state. Rather, the borrower sought out the lender in the State of Washington."

ilding and Loan Association v. Lanzarotti,

29, 47 Idaho 287, 274 P. 630-632:

This court stands committed to the rule that 'this being purely an action in rem, and the enforcement of the claim being only maintainable in Idaho, it cannot be contended that the intention of the parties was that the laws of 'Montana' should obtain in the construction of the contract.' (citing Vermont Loan and And Shea)"

The Circuit Court analyzed Zimmerman v.

own, 1917, 30 Idaho 640, 166 P. 924, in

aching the conclusion of the Whitman case,

d noted from Zimmerman the lack of "proof

bad faith or of an effort to evade the

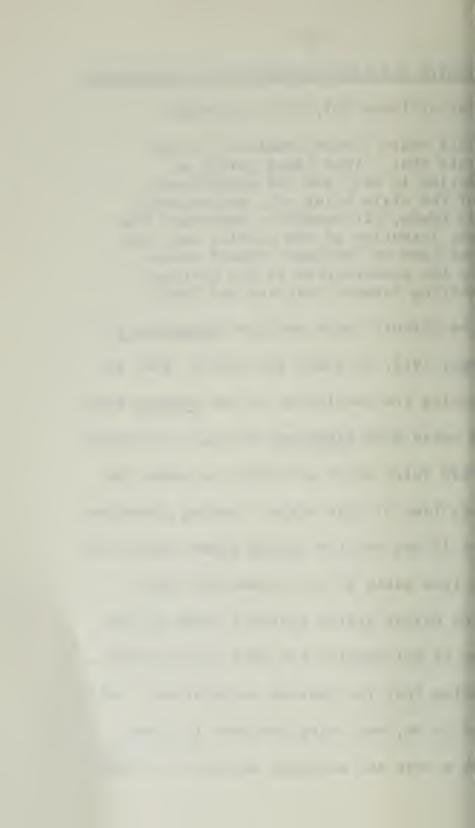
ury laws of this state," noting therefrom

at it was not the in rem aspect which was

e true basis of the Lanzarotti rule.

The United States District Judge in the

The United States District Judge in the se at bar applied the rule as so defined, nding that the Montana corporation, qualied to do, and doing business in Idaho, ok a note and mortgage usurious by Idaho



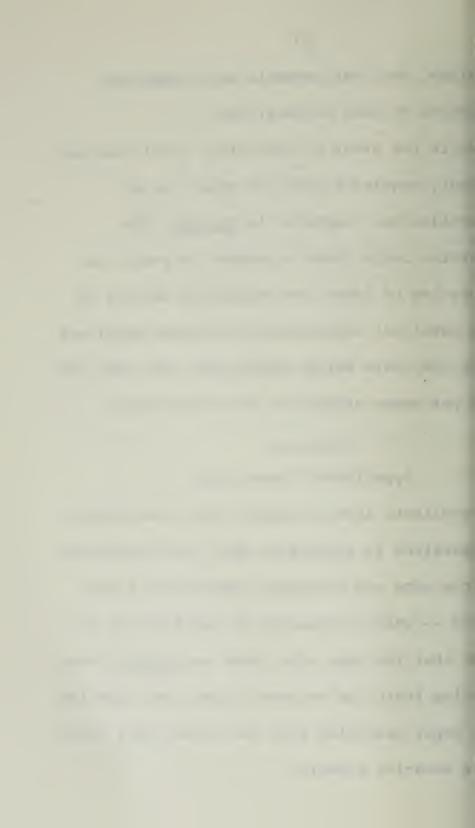
atute, and that payments were taken and ceived by both corporations.

As to the proof of bad faith, or of usurious tent, requisite proof of which as an sential was suggested in Whitman, the strict Judge found a purpose to evade the ury law of Idaho, and noted the failure of e appellant corporations to advise appellees at they were being charged any less than the % per annum stipulated for in the note.

Appellants Concessions

Appellants seem to concede that the Montana rporation is chargeable with the preparation the note and mortgage, Appellants Brief,

30 -- which concession is justified by the ct that the same were drawn on printed forms thing forth the corporate name, and appellee Edgar testified that the notary only acted a notarial capacity.



the top of page 32, Appellant's Brief, is ated the concession that the Montana rporation is charged with knowledge that e maximum legal rate of interest in Idaho s 8%.

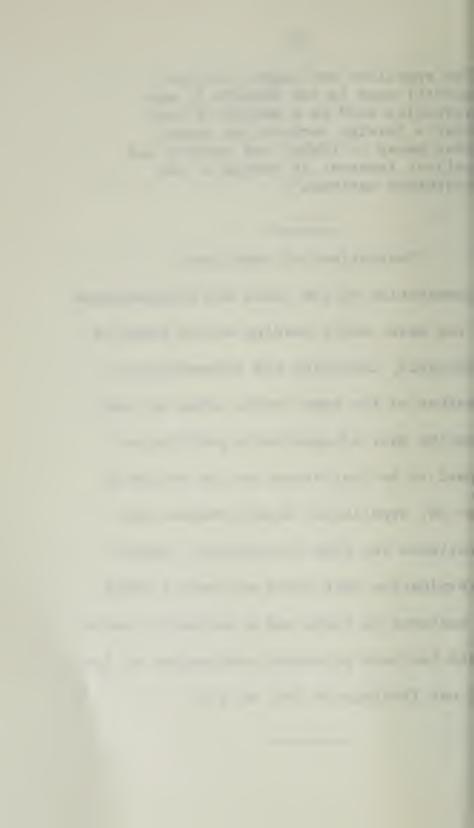
On the top of page 37, Appellant's Brief, is ted the distinction between the position of e Idaho acceptance corporation, here an signee of the non-negotiable mortgage, tother with the debt thereby secured, and an dorsee in due course of negotiable paper thout actual notice of usury.

In the next to last paragraph of page 37, pellants' Brief is correctly stated that the sho usury statute "also makes provision for penalty to be suffered by the person to whom srious interest has been paid."

Finally, on page 38 of Appellants brief is ated:

"As appellant has urged, the Lanzarotti case is one wherein it was virtually held as a matter of law that a foreign corporation cannot loan money in Idaho, and reserve and collect interest in excess of the statutory maximum."

Contentions of Appellants Examination of the facts and circumstances the case, and a reading of the brief of pellants, including the foregoing conssions of the appellants, seems to indite the gist of appellants position on seal to be that stated on the bottom of ge 38, Appellants Brief, whereat the bellants say that the District Judge's termination that there was both a doing business in Idaho and a purpose to evade tho law were erroneous conclusions of law, I not findings of fact at all.



Argument

Appellants cite to the Court the case of

ndgren v. Freeman, 1962, Ninth Circuit, 307
d 104. In this case the Circuit Court resolved
e question of whether or not the "clearly ereneous" provisions of Rule 52 (a) F.R. Civ.
has application where it is contended on
epeal that the credibility of the witnesses
not involved. The holding of the court was:
"Rule 52 (a) explicitly clearly applies
where the trial court has not had an
opportunity to judge of the credibility of

Lundgren v. Freeman, supra At 114 of 307 F2d

It is submitted that the appellants go far ield in citing this case, for the reason at witnesses did testify in the case at r, and it was for the District Judge to termine the credibility to be attached to e testimony of Mr. Edgar which established

witnesses."

at the transaction leading into the note d mortgage was an Idaho transaction.

In any event, the "clearly erroneous" le here applies, and it was the province the trier of the facts to determine ere the transaction took place, and to nd as a fact the evasion of Idaho law, d of bath faith on the part of the app-

"Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the

appellate court will second-guess

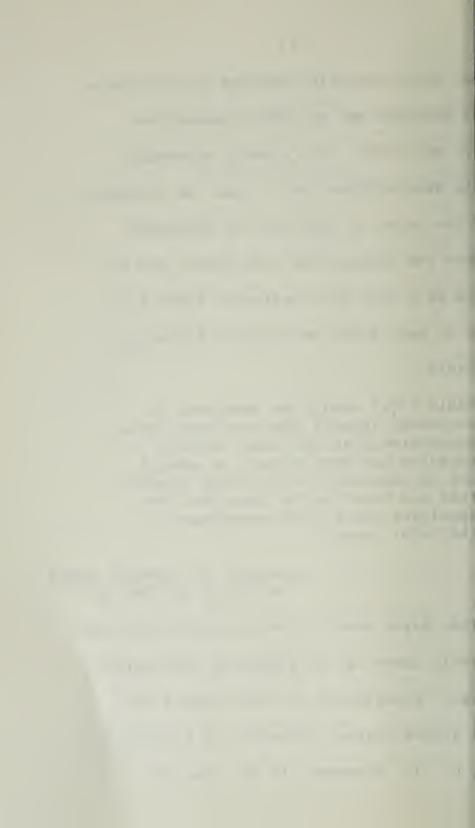
the trial court."

lants.

Lundgren v. Freeman, supra at 114 of 307 Fed 2d.

This Edgar case, to be now decided by the reuit Court is, as stated by the District dge, "practically on four squares with a quoted factual situation in Lanzarotti."

. p. 53. Moreover, it is, from the

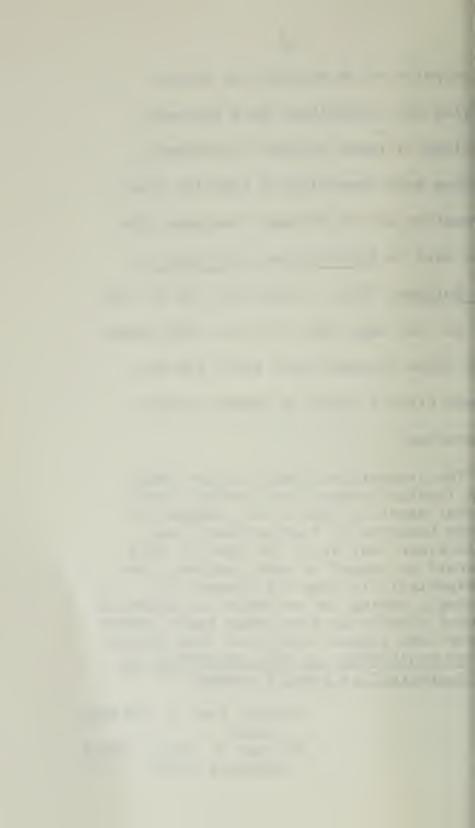


aving had "experience with the mainorings of human conduct" (Lundgren),
case more deserving of judicial conemnation and in stronger language than
as used in Vermont Loan and Trust Co.
Hoffman, 1897, 5 Idaho 376, 49 P. 314,
5 Am. St. Rep. 186, 37 L.R.A. 509, where
he Idaho Supreme Court said, and the
enth Circuit Court of Appeals quoted

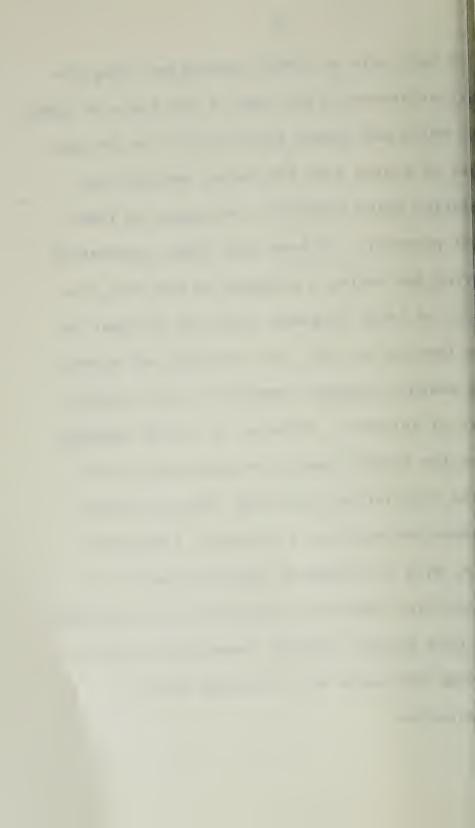
"The proposition simply states this: A foreign corporation, having a resident agent in this state, engaged in the business of loaning money upon interest, may avoid the laws of this state in regard to such business, and especially in regard to usury, by simply making the evidences of indebtedness payable in some other state, where the laws against usury are less onerous. The monstrosity of the proposition is tooapparent to require comment. * * *"

erefrom:

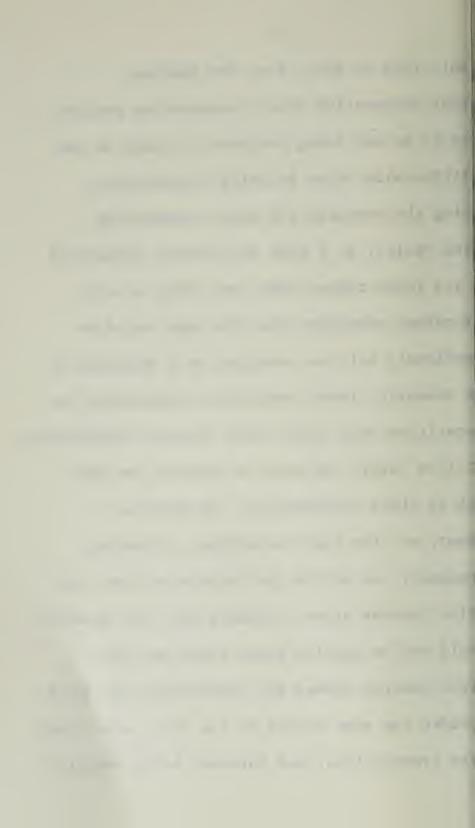
Vermont Loan v. Hoffman, supra Whitman v. Green, Supra (emphasis added)



We have here an Idaho corporation owing its ry existence to the laws of the state of Idaho. d which was formed specifically for the purse of buying from the parent Montana corration which borned it, mortgages on Idaho al property. We have this Idaho corporation ying and owning a mortgage on the real prorty of Idaho citizens, with the interest on e face set at 10%, and receiving and acceptg monthly payments computed at that usurious te of interest. We have, to borrow language om the Vermont case, the monstrosity of an aho corporation acquiring, from its parent ntana corporation, a ten-year, 120-payment te, with 119 payments yet to be made, the ansaction supposedly purified by the mortgage, 1 note secured thereby, momentarily passing rough the hands of the foreign parent cporation.



But, then we have, too, the foreign rent corporation also a corporation authored to do and doing business in Idaho in cometition with other building corporations. king the mortgage and note, encumbering laho realty, at a rate of interest prohibited its Idaho competitors, and doing so with forehand knowledge that the same would be mediately sold and assigned at a discount to s domestic, Idaho subsidiary corporation, in mpetition with other Idaho finance corporations. Called before the bars of justice, we have th of these corporations, the Montana rent, and the Idaho subsidiary, pleading nocence, and on the boot-straps of their own fice records alone, claiming that the penalty ould not be applied where their own corrate records showed the transaction was being corded the same status of its fifty some other aho transactions, and interest being computed



8% rather than the 10% stipulated for the note and mortgage.

Yet, caught on the horns of a dilemna, while urging that usury was not exacted on the rporate records because it was treated as Idaho transaction, the appellants continto argue before the Circuit Court of Appeals at this was not an Idaho transaction at all. And, at the same time, because it is the uth, the appellants have admitted that from e time of signing the note and mortgage on eir Idaho realty, there was never a time at the appellees were ever advised of the od news that they were in actuality being arged only 8% interest.

Any court of law or equity would require of e appellants that they informed the appellees cordingly. But they did not, not the Montacorporation, not the Idaho corporation,

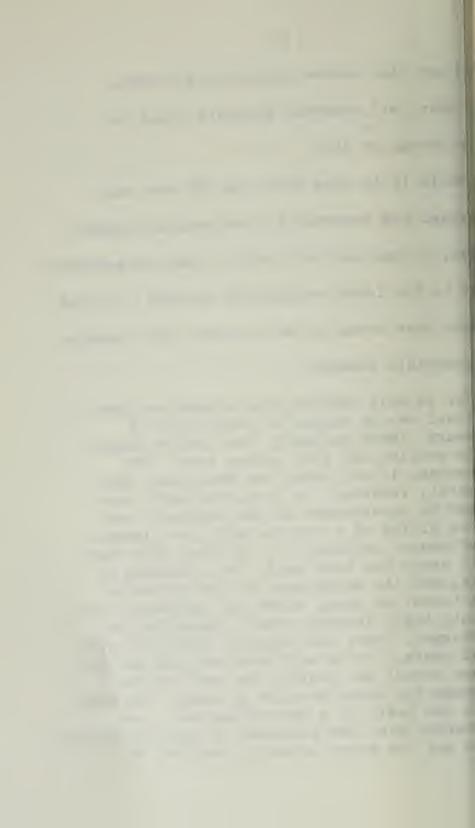
- - - - - nd not the trustee appointed for each.

turn, all accepted payments based on the charge of 10%.

propriate comment:

While it is true that the 10% rate was narged and reserved by the Montana corporation, it was not only paid to that corporation. It to the Idaho corporation as well. An old was case seems to be in point, and contains

"It is well settled, that a usurious contract may be purged of everytaint of usury. (Webb on Usury, Sec. 482 et seq.) In section 482 that author says: Of course, if ng. usury has been paid, but merely reserved, it is sufficiently purged by a surrender of the contract, and the giving of a new one with the element of usury excluded. It is also held that, if usury has been paid, the refunding of it, and its acceptance by the person in interest as such, under the agreement that only legal interest shall thereafter be charged, frees the contract from the taint of usury. It is well settled that parties can cancel and destroy the one contract, purge the consideration of usury, and make it the basis of a new obligation, and thereby bind the borrower, in law and equity, to pay the money actually received on

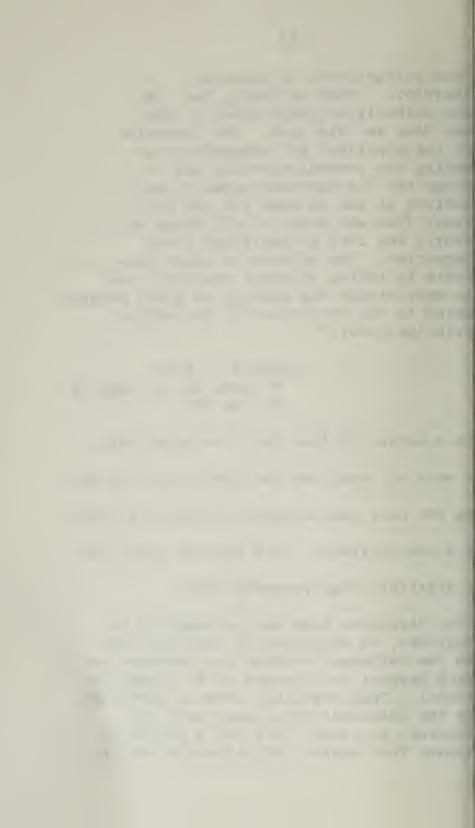


"and a legal rate of interest therefor. (Webb on Usury, Sec. 291, and authorities there cited.) That was done in this case. The intention of the appellant and respondents in making the renewal contract was to purge the old contract of usury, and destroy it and to make the new contract free and clear of all taint of usury; and they accomplished their intention. The offense of usury conissts in taking unlawful interest, and in many states the penalty is quite severe, going to the forfeiture of the entire principal debt."

Sanford v. Kunz 9 Idaho 29, at page 34 71 Fac 612

As a matter of law, the, the appellants, and each of them, had the opportunity of purns the note and mortgage of usury by offerig a new contract. This was not done, and the District Judge properly held:

"The defendant knew the interest to be improper, as evidenced by the fact that on the defendant's books the interest on each payment was charged at 8% (legal in Idaho). This certainly shows a knowledge by the defendant of a legal rate of interest in Idaho. Yet for a period of almost four years, the defendant and its



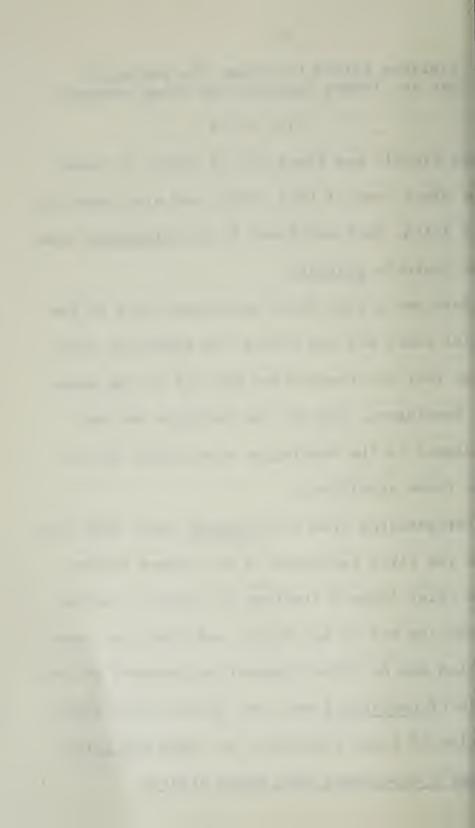
"assignee failed to advise the plaintiff that any lesser interest was being charged."

Tr. p. 54

ere clearly was the proof of effort to evade he usury laws of this state, and also proof of ad faith, both mentioned in the Zimmerman case, and quoted in Whitman.

Here was a case where appellants both in the cial court and now before the appellate court rge that the transaction was one of the state washington, and yet the mortgage was not signed to the Washington subsidiary, but to be Idaho subsidiary.

Paraphrasing from the Lundgren case, page 115, and the first paragraph of the second column, be trial judge's findings of intent to evade also law and of bad faith, and that the transtion was an Idaho transaction governed by the alle of Lanzarotti were not derived from applition of legal standards, but from the trial adge's experience with human affairs.

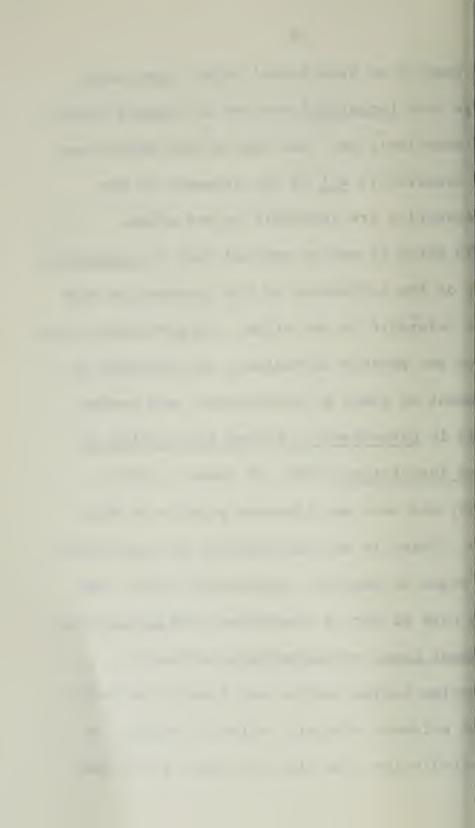


"Therefore, we may not substitute our judgment if conflicting inferences may be drawn from the established facts by reasonable men, and the inferences drawn by the trial court are those which could have been drawn by reasonable men."

Lundgren v. Freeman, supra at page 113, first column

: is submitted that the trial court, and now ne appellate court, are being asked too much mere appellants continually argue that appellees ere charged only 8%, on the basis of Defendants chibit No. 6. So long as the appellees were lying on a note that called for 120 payments : \$71.37 each, predicated upon a charge of 10% iterest, and payments at that rate were paid appellants, and received without any advice the contrary being given appellees, the strict Judge was correct in finding that both pellant corporations were paid and knowingly ceived interest at a rate usurious by Idaho W.

uniting ! a druller page 22 of appellants' brief, appellants rge that Lanzarotti can not be applied unless. appellants say the fact of the matter was Lanzarotti, all of the elements of the ansaction are referable to one situs. To which it may be replied that in Lanzarotti 1 of the incidences of the transaction were t referable to one situs. In particular, the te was payable in Montana, the incident or ement of place of performance, and presumly in Cornelison v. United States Bldg. & an Association, 1930, 50 Idaho 1, 150 P. 55, the note was likewise payable in Monta. There is no justification for appellants argue at page 23, appellants' brief, that e case at bar is dissimilar from Lanzarotti, rmont Loan, and Cornelison because of preign subject matter and foreign contact." On evidence virtually without conflict or ntradiction, the District Judge found that



e Montana corporation was doing busiess in Idaho, and that it sought out the pellees in Idaho, sold them a prefabrited house in Idaho, and financed the same a note and mortgage of Idaho realty, the te being usurious on its face, with the rtgage to be immediately assigned to an aho subsidiary corporation. The "foreign ntract" here is no different than it was Lanzarotti -- the making of the obligaon payable in Montana. One other minor point should be mentioned. e mortgage purchased by the Idaho subsidiary, d assigned to it was not "negotiable paper"

d assigned to it was not "negotiable paper"

ference to which is made in sec. 27-1907 I.G.

e mortgage was not endorsed to the Idaho

rporation, but assigned, and, moreover, this

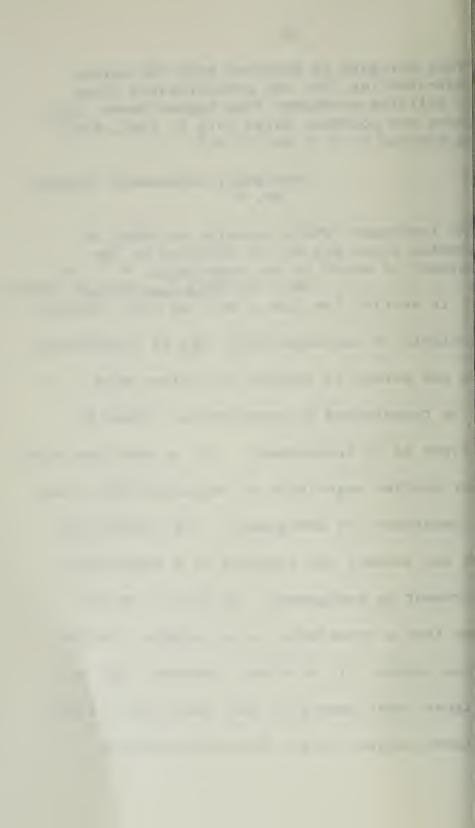
s correct, because it could not be negotiable

th the following provision therein contained:

"This mortgage is executed with the mutual understanding that the prefabricated house or building purchased from Hughes Homes, Inc., under the contract dated July 6, 1960, shall be erected * * * etc * *."

Mortgage, Defendants Exhibit
No. 2

'An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. * * *" Sec. 27-195strumen Vgiform Negotia it is settled law that a bill or note, whether gotiable or non-negotiable, may be transferred om one person to another in various ways. It y be transferred by negotiation, either by livery or by endorsement. Or, as was done here, per whether negotiable or non-negotiable, "may transferred by assignment. The Uniform Act s not prevent the transfer of a negotiable strument by assignment. In fact it recoges that a transferee is not always a holder due course. It is clear, however, that an signee takes generally only such title as his ignor subject to all defenses available

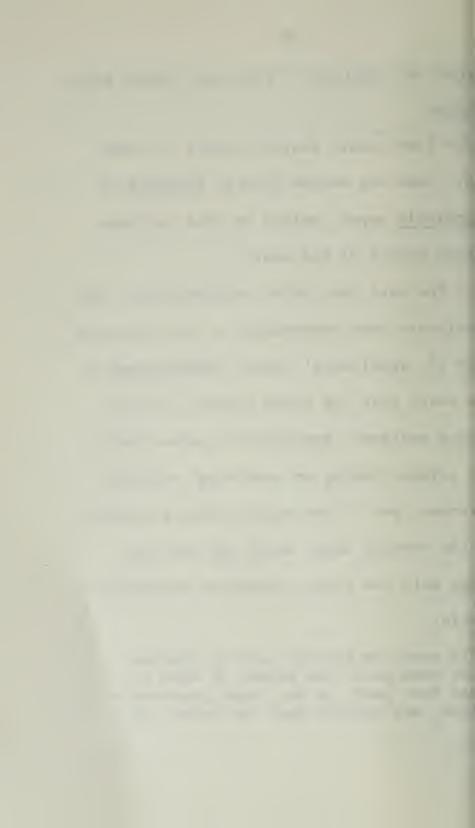


Notes.

The Idaho usury statute itself, 27-1907, C., does not excuse even an <u>indorsee</u> of gotiable paper, unless he does not have tual notice of the usury.

In the case here under consideration, the pellants have commendably at the bottom of ge 37, appellants brief, acknowledged to e court that the Idaho statute, in the cond sentence, specifically makes liable e person "taking or receiving" usurious terest, and it was exactly this provision the statute under which the District dge held the Idaho acceptance corporation able:

'In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back the amount of



"interest thus paid from the person taking or receiving the same, plus twice the amount of such interest in addition."

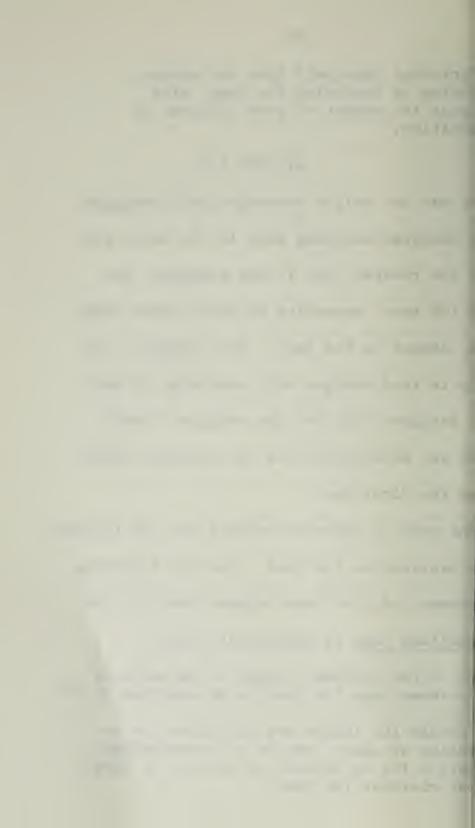
27-1907 I.C.

ne mortgage carrying with it the note, and of the reverse, but it was assigned, and the 10% rate, amounting to usury under Idaho w, showed on the face. The assignee not ly is thus charged with knowledge of what e assignor did, but the assignee itself ok and received all of the payments other an the first one.

The note in question calling for 10% interest s usurious on its face. And the following atement of the Idaho Supreme Court in the rnelison case is appropriate here:

"* * the contract sought to be enforced is shown upon its face to be usurious.* *"

"Though the lender may not intend to be guilty of usury, yet he is nevertheless guilty for he intends to do what he does but mistakes the law."

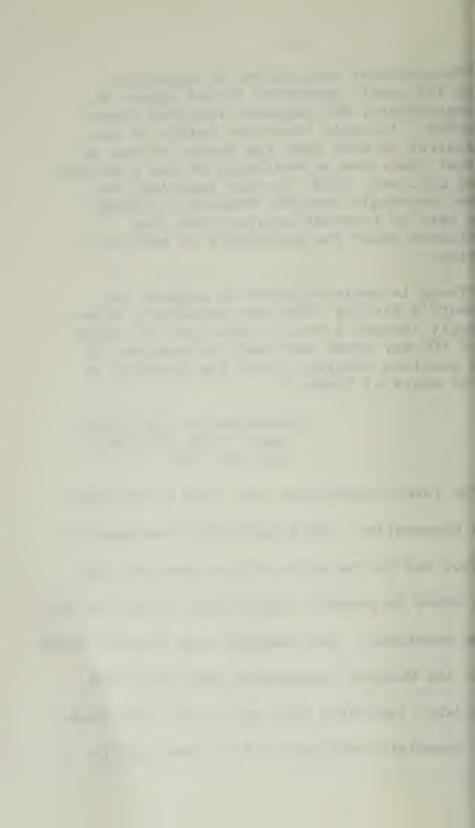


"The contract was drafted by appellant or its agent, presented to and signed by respondents, and payments received thereunder. It would therefore hardly be consistent to hold upon the record before us that there was no violation of the provision of C.S. sec. 2554, in that appellant did not knowingly receive, reserve or charge a rate of interest greater than that allowed under the provisions of said section."

"There is ample evidence to support the court's finding that the defendants knowingly charged a rate of interest in excess of 10% per annum and that the contract is a usurious contract under the statutes of the state of Idaho."

Cornelison v. U.S. Bldg. Assn. 1930, 50 Idaho 1, 292 Pac. 243

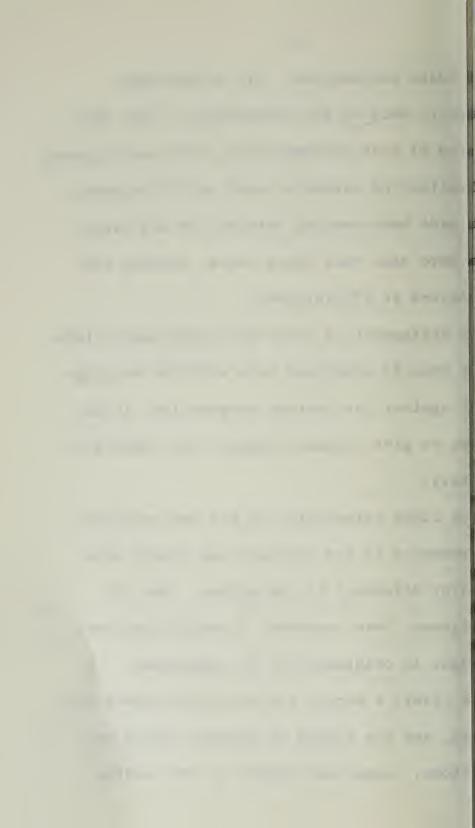
The Idaho corporation was owned by the Monta corporation. Both were doing business in
aho, one in the state of its creation, and
be other by properly qualifying. Each had the
me president. The Anaconda case clearly shows
at the Montana corporation made its sales
all Idaho, including this one to the appellees,
be immediate assignment of the mortgage to



de Idaho corporation. All of this was nown to both of the corporation. And, then, top of such circumstances, both participated collecting payments based on 10% interest, and made book-keeping entries for use later, and here used four years later, showing comtations at 10% interest.

In Assignment of Error XIV, appellants claim at even if appellees were entitled to judgent against the Montana corporation, it was aror to give judgment against the Idaho subdiary.

The Idaho corporation on its own petition, presented by its trustee, had itself made party defendant to the action. Had its signment been recorded, it would have been ought in originally by the appellees. It de itself a party, and the proof showed bad ith, and the taking of payments which were urious. Appellants admit in the wording



the very Assignment XIV: "The statute so penalizes the person who is paid such interest rate." Appellants brief, p. 14.

The District Judge made no error in giving dgment against both corporation. The nzarotti case squarely applied.

Respectfully submitted,

Stephen Bistline

Attorney for Appellees

Sandpoint, Idaho

ration of this brief, I have examined Rule
and 19 of the United States Court of Appeals
r the Ninth Circuit, and that, in my opinion,
e foregoing brief is in full compliance with
ose rules.

Stephen Bistline

